the proper interest in respect of the two sums of RM3000 and RM12,000 from the respective dates of the withdrawal of the said sums until the date of realisation.

Finally as to the complaint of the plaintiff regarding the awarding of damages for breach of trust committed by the defendant, the short answer is that the plaintiff has not prayed for damages in her statement of claim. That being so the question of damages does not arise as a plaintiff is bound by his pleadings. To allow his unpleaded claim for damages would amount to allowing him to make good the defective pleading which this court cannot do - see *UMBC Bhd. v. Palm & Vegetable Oils (M) Sdn. Bhd.* [1983] 1 MLJ 206 @ 207.

I shall now turn to the defendant's appeal. His complaint is that the SAR wrongly held that the total sum received by the defendant as RM22,889.61 when in fact the said sum of RM22,889.61 included a sum of RM2,474 which was costs paid directly to the plaintiff's solicitors. The complaint of the defendant is without any basis simply because the defendant himself had applied for and obtained an order of court on 8 June 1982 to release to him a sum of RM2000 "to be paid to M/s. Bachan & Company, Solicitors for the plaintiff as solicitors and client's costs." The SAR had in her certificate duly deducted the said sum of RM2,000 from the award granted to the plaintiff.

To summarise my findings:

1. The SAR should have allowed the surcharge on the sum of RM3,000;
2. the rate of interest of the two sums of RM3,000 and RM12,000 should be 15% per annum from the respective dates of withdrawal to the date of realisation in respect of the RM3,000 and the date of repayment into the plaintiff's account in respect of the RM12,000.

I therefore order accordingly together with costs of this proceeding to be paid by the defendant.

NG CHUN LOI @ PHIONG YOK KEOW

v.

HADZIR BIN YUNUS & 2 ORS.

HIGH COURT, PENANG
DATO' EDGAR JOSEPH JR. SCJ
[CIVIL SUIT NO. 443 OF 1980]
11 JULY 1992

TORT: Road accident - Conflicting versions as to the circumstances of the accident - Question of how the accident occured - Use of sketch plan and key - Injuries - Quantum - Assessment.

The plaintiff was a passenger on a bus being driven by the first defendant on which the second defendant was the conductor and both of whom were at the material time acting as agent or servant of the third defendant.

The plaintiff's case was that while she was about to alight from the bus after it had stopped, and before she could safely do so, it started moving again causing her to fall out of the open door of the bus onto the road as a consequence of which she suffered serious personal injuries.

The defence on the other hand was that the plaintiff had negligently alighted from a moving bus, without caring for her own safety, and an such she was the author of her own misfortune. In particular the first and second defendants alleged that the bus never stopped at the scene of the accident where there was no request bus stop.

The plaintiff suffered head injuries as a result of the accident and as such was unable to testify at her trial but the case for the plaintiff hinged upon the evidence of an eye-witness to the accident.

Held:

[1] The blood found six feet from the grass verge as one faced the Hill Railway Station and marked as "K" on the sketch plan must be the spot where the plaintiff had fallen. At the time the plaintiff fell from the bus it must have been travelling about six feet from its near side edge of the road. The position of the blood mark on the road, supports and/or is consistant with the testimony of the eye-witness that the bus had stopped two to three feet from its near side of the road.

[2] The bus driver having stopped at the scene to allow a passenger to alight, ought to have foreseen that there might be other pas-

sengers who might also wish to do so and should have waited until the plaintiff had safely alit. His failure to do so was negligence and his negligence was the direct cause of the injuries sustained by the plaintiff.

[3] The conductor had failed to keep a proper look out from time to time to ensure that passengers did not alight from a moving bus. The conductor was also negligent. The third defendant is vicariously liable for the negligence of the bus driver and the conductor. The plaintiff was in no way to blame for the accident and is absolved from all liability.

[4] The plaintiff is awarded by way of general damages:

(a) RM100,000 for the brain injury and the residual disabilities flowing from it.
(b) RM10,000 for the general decrease in hearing intensity in all frequencies bilaterally in both ears.
(c) RM2,000 for the loss of two incisors.
(d) RM38,700 for nursing care.

[5] The plaintiff has failed to establish, on a balance of probabilities, any loss of earnings and has failed to sufficiently prove the claim for transport expenses.

[Judgment for the plaintiff with interest and costs.]

Cases referred to:
Chong Ying Khoon v. Lee Joo Nam & Anor. [1986] 2 MLJ cclv ***(refd)***
Goh Whatt Seng v. Chua Sek Kuon BLJ June 1991 ***(refd)***
Ibrahim bin Mat Yatim & Anor. v. Gan Jiuk Tiau [1985] 2 MLJ cxlviii ***(refd)***
Kayat & Anor. v. Lim Yew Seng [1972] 1 MLJ 26 ***(foll)***
Kow Ah Dek & Anor. v. K. Ratnasingam [1981] 2 MLJ 24 ***(refd)***
Kuppusamy a/l Sundarajoo v. Nithannathan a/l Muniandy [1990] 1 CLJ 1148 ***(refd)***
Mottram v. South Lancashire Transport Co. [1942] 2 AER 452 ***(foll)***
Murtadza bin Mohamed Hassan v. Chong Swee Pian [1980] 1 MLJ 216, 218 col. 2 para H ***(foll)***
Prescott v. Lancashire United Transport Co. [1953] 1 AER 288 ***(foll)***
Teoh Suan Eng v. Lew Meng Shin & Anor. [1982] 2 MLJ 291 ***(refd)***
Tham Yew Heng v. Chong Toh Cheng [1985] 1 MLJ 408 ***(refd)***
Tominam bte. Tukimin v. Toh Kai Chup [1985] 2 MLJ 345 ***(refd)***

Legislation referred to:
Rules of the High Court, O. 42 r. 12

For the Plaintiff - A. Sandhu; M/s. Ajmer Singh Sandhu Co.
For the Defendant - S JD Mathuram; M/s. Mathuram & Co.

JUDGMENT

Edgar Joseph Jr. SCJ:

In this road accident case, the rival versions as to the circumstances of the accident were these:

The plaintiff's case was that she had suffered serious personal injuries as a direct result of the negligence of the first defendant (the bus driver) in the driving of bus No. PH 5264, (the bus) as agent or servant of the third defendant, when she was about to alight from it and before she could safely do so, a short distance before the Hill Railway Station Bus Stop in George Town, Penang.

It was also the case for the plaintiff that the second defendant, a conductor (the conductor) on the bus and an agent or servant of the third defendant, was also negligent, in that he had failed to station himself at the door of the bus, when the bus was in the vicinity of a bus stop, so as to ensure that passengers, in particular, the plaintiff, did not alight until the bus had come to a stop and, generally, in failing to take such steps as may have been necessary to ensure the safety of the passengers, in particular the plaintiff.

The plaintiff herself, a girl, 19 years of age at the time of the accident, was unable, by reason of the effect of the injuries she had sustained, to testify at the trial but there was called on her behalf one - Lim Mun Leong (PW. 3), a resident of Penang Hill, 46 years of age at the time of the accident, who claimed that he was an eye witness to the accident.

In particular, he claimed that at the material time, he was walking to the city to purchase provisions, keeping to the right hand side of the road, as one faces the city, when he saw the bus coming towards him in the opposite direction. He added that the bus kept close to its nearside edge of the road - about two to three feet - as it approached him and he then stepped onto the grass verge and stood there. The bus too stopped at that point some three to four feet from him. He had also said that when a passenger had alighted from the bus, it started to move again and that as the bus was moving another passenger (later identified as the plaintiff) fell out of the open door of the bus onto the road. Asked

by Counsel for the plaintiff, where the plaintiff was at the time the first passenger had alighted, he replied that the plaintiff was walking down the steps of the bus. He agreed with Counsel's suggestion that the plaintiff was alighting from the bus when the bus started to move.

He went on to say that the bus proceeded for a distance of over twenty feet after the plaintiff fell out of the bus before pulling up. The driver of a passing car picked up the plaintiff and took her to hospital. The witness claimed that he had assisted the driver in carrying the plaintiff into the car which he described as a saloon car with no taxi plate on it.

Asked by Counsel for the plaintiff, about the practice of the third defendant's buses as to when they would stop to allow passengers to alight, the witness said that based on his personal experience, they would stop when a passenger sounded the bell, even though there might have been no bus stop sign at the place in question.

Asked further by Counsel, if, at the material time, there was any bus stop along the road shown in the sketch (p. 3 AB), he replied that there was no bus stop until the Hill Railway Station.

Under Cross-examination by Counsel for the defendants, he said that at the time the passenger concerned had alighted, the bus started to move and that at that point of time the plaintiff was on the steps stepping down to alight.

It was put to him that he was never at the scene of the accident, but the witness maintained that he was standing there. He added that he was employed as a caretaker at a flower nursery on Penang Hill and he named his employer.

There was also called in support of the Plaintiff's case, the Investigating Officer Din bin Desa (PW.2) who had long since retired. He testified that at the material time he was attached to the traffic section of the Patani Road Police Station when, at 3.00 pm on the day in question, he had received a report about a road accident. On arrival at the scene, he saw the bus stationary at the scene and proceeded to prepare a sketch plan and key. Both the sketch and the key were put in and marked (pp 3 and 4 AB). Of significance in the sketch was the point marked "K" which marked a blood stain on the road.

It was common ground that this blood stain was caused by blood which oozed from the plaintiff and was 6 feet from the grass verge as one faced the Hill Railway Station. In my opinion, this blood stain must be the spot where the Plaintiff had fallen, there being no evidence to the contrary. [See *Kayat & Anor. v. Lim Yew Seng* [1972] 1 MLJ 26 per Syed Othman J.]

The Investigating Officer also testified that he had not ascertained whether there was a bus stop at or near the scene of accident but, he added, that it was the practice for bus drivers to stop away from bus stops to enable passengers to alight, especially where they were known to the driver and also, to enable passengers to embark.

I must next turn to consider the case for the defence which was that the plaintiff had negligently alighted from a moving bus, without caring for her own safety, so that she was the author of her own misfortune. In particular, the bus driver and the conductor alleged that the bus never stopped at the scene of accident where there was no request bus stop. The bus driver had also said that he was not at liberty to stop the bus wherever he liked and also that passengers were not entitled to stop the bus in between bus stops to board the bus.

Now, the whole of the material evidence has been carefully and critically examined in the written submissions of Counsel for the parties, every word of which I have perused more than once, and it is unnecessary to discuss it again at any length. I shall therefore confine myself to the matters which struck me as being of critical substance.

I would, first of all, refer to the sketch plan prepared by the Investigating Officer who I consider was an independent witness and whose evidence I accept.

Upon that evidence, I find that the blood mark "K" on the sketch plan was the spot where the plaintiff had fallen from the bus. [Per Syed Othman J. in *Kayat & Anor v. Lim Yew Seng*]. I have already noted that "K" was five to six feet from the left edge of the road as one faces the Penang Hill Railway Station. It can therefore be reasonably inferred that at the time the plaintiff fell from the bus it must have been travelling about six feet from its near side edge of the road.

Counsel for the plaintiff argued that this went to corroborate the testimony of the eye witness (PW. 3) that the bus had stopped two to three feet from its near side of the road. More particularly, the eye witness had testified that when the "bus started to move the Plaintiff was on the steps getting down to alight". This, said Counsel was "the reason why the blood mark was found six feet from the side of the road."

On the other hand, Counsel for the defendants argued that the eye witness had testified that he was standing on the grass verge when the passengers were alighting and that the door of the bus was then about three to four feet from him but this was contradicted by the position of the blood mark "K" on the sketch plan which was six feet from the edge of the road. This, said Counsel, indicated that the bus must have been more than six feet away from the edge of the road and so lent credibility to the defence version that the bus was proceeding slowly uphill when the plaintiff decided to alight and so fell out of the bus.

In my opinion, the inference which Counsel for the plaintiff has invited this court to draw from the position of the blood mark on the road, as evidenced by the sketch plan, is the more probable and reasonable one than that contended for by Counsel for the defendants which I find to be a hair splitting exercise. However, I would not go so far as to say, as does Counsel for the plaintiff, that the position of the blood mark on the road, **corroborates** the testimony of the eye witness; I would prefer to say that it **supports** or is **consistent** with the testimony of the eye witness.

I am fortified in this conclusion by asking myself, why, if the defendants' version were true, that the bus never stopped, should the bus have gone to the side of the road and why, was the blood mark found six feet from the side table? The inevitable answer to this question is that the version of the eye witness as to the circumstances of the accident is most probably true, whilst that of the bus driver and the bus conductor is most probably false and untrue, and I so find.

I would add that from the position of the bus after the accident, which was some 55 feet from the blood mark "K", it could be reasonably inferred that having pulled up at its near side of the road to enable passengers to alight, it then proceeded on its journey moving to the centre of the road and pulled up again some 55 feet from the blood mark "K" and some 16 feet from its near side of the road as a result of the bus driver hearing shouts from passengers that some one had fallen out of the bus.

I would further add that I had not overlooked the submission of Counsel for the defendants that the testimony of the eye witness and the Investigating Officer, as well as the sketch plan, indicated that there was no request bus stop at the approach road to the Hill Railway Station adjacent to the blood stain marked "K" in the sketch. Moreover, the nearest bus stop - the Railway Quarters Bus Stop - was not more than twenty feet from the scene, while the other bus stop nearby -the Hill Railway Station Bus Stop - was about 120 feet from the scene. It was therefore said that there was no reason for the bus to have stopped at the scene.

I do not consider it in the least improbable that the driver of a bus might accommodate a passenger by stopping to enable the passenger to alight at a place where there is no bus stop or at a place which is close to a bus stop, and even if by so doing he might be acting contrary to the instructions of his employer. In any event, we have here the cogent evidence of the position of the blood stain on the road and the testimony of the eye witness who I believe.

The bus driver having stopped at the scene to allow a passenger to alight, - and I so find - ought to have foreseen that there might be other passengers who might also wish to do so and should not therefore have started again until all passengers concerned were safely on or off. Had the bus driver taken this elementary precaution; for example, by looking around, he would have noticed that the plaintiff was still standing on the steps and should therefore have allowed her to alight before starting again. I therefore find the bus driver negligent in having failed to do so and that his negligence was the direct cause of the injuries sustained by the plaintiff.

As for the conductor, he was collecting fares at the time the plaintiff fell off the bus. It was only after passengers had shouted that someone had fallen out of the bus that he told the bus driver to stop. It could therefore be reasonably inferred that the conductor was unaware that the bus having stopped had started to move

again before the plaintiff could safely alight, and so the conductor had failed to warn the passengers that they could not alight unless the bus came to a complete stop nor had he communicated with the bus driver in time and, therefore, that he had failed to keep a proper look out from time to time to ensure that passengers did not alight from a moving bus.

In *Mottram v. South Lancashire Transport Co.* [1942] 2 AER 452, Goddard, LJ (as he then was) said:

> After the man had given the signal for the bus to stop, and if the bus had stopped, it would have been the duty of the bus conductress to see that no one else was getting off before giving the signal for the bus to start again. In this case, the bus never did stop. Before it could stop the officious passenger gave the signal for the bus to start again.

That statement by Goddard, LJ was adopted by the Court in *Prescott v. Lancashire United Transport Co.* 1953 [1953] 1 AER 288 and, I too, would respectfully do likewise.

I therefore find that the conductor was also negligent.

Upon the facts as found by me, I do not consider that the plaintiff was in any way to blame for the accident and I therefore absolve her from all liability.

It was common ground that the bus driver and the conductor were servants of the third defendant and that, at the material time, they were acting in the course of their employment. I therefore hold the third defendant vicariously liable for the negligence of the bus driver and the conductor. It follows that it is unnecessary for me to apportion liability as between the bus driver and the conductor.

I must next assess the quantum of damages.

The agreed medical report on admission dated 2nd September 1980, signed by Dr. S. Kathirvel, the Medical Officer attached to the General Hospital, Penang, disclosed that the plaintiff was admitted to hospital on the day of the accident and was then found to have the following injuries:

> 2" ragged laceration wound right parietal region.
> Clotted blood both nostrils.
> Abrasions right ankle and right knee.
> X-rays skull: No fracture.
>
> Her general condition was poor.
>
> She was comatose and responded to painful stimuli only.
>
> She was treated conservatively and her condition improved slowly. But on 24 October 1978 her condition started deteriorating. A CAG was done on the same day which showed a subdural haematoma. On 25 October 1978 a craniotomy done and the haematoma drained. After surgery her condition was better. When she was discharged, she was conscious, she had unsteady gait, not able to communicate. She was periodically reviewed at the clinic and her condition was better and she was able to answer simple questions.
>
> She was diagnosed as suffering from severe cereberal contusion and cereberal access.

Subsequently, that is to say, on 29 September 1981, she was examined by Dato' (Dr.) N. Arumugasamy, Head of the Department of Nerosurgery, General Hospital, Kuala Lumpur, who gave a detailed report upon the plaintiff which was part of the agreed bundle of documents.

According to that report, at the time of the examination, Dato' Arumugasamy was informed of the plaintiff as follows:

(1) She felt very weak and was unable to walk well.
(2) She complained that her left side hurt and that she had become increasingly forgetful and was not able to work.
(3) She occasionally cried with pain and became troublesome to manage at home in view of her indifferent attitude and poor memory.

His examination revealed:

(1) She was poorly co-operative.
(2) Hearing was questionable and she was then subjected to audiometry test which revealed a general decrease in hearing intensity in all frequencies bilaterally in both ears.
(3) Examination of her higher functions indicated that there was definite memory impairment for recent and past events and that she suffered from some degree of dysculculia.
(4) She appeared somewhat retarded and poorly motivated in the performance of the several recognition tasks given to her.
(5) Her right leg was weak compared to the left. Power on the left side was normal. On walking, she dragged her foot somewhat

and she conducted the right leg as if on a hemiparetic gait.

(6) Her gait was somewhat unsteady.

On these findings, Dato' Arumugasamy expressed the opinion that:

(1) There is ample evidence that this patient sustained a severe head injury as a result of which she developed an intracerepral haematoma requiring craniotomy at the General Hospital Penang.

(2) Computer axial tomograns at this time revealed marked atrophy and ventricular dilatation in the location of the haematoma with loss of cerebral substance.

(3) She has weakness in the leg and insteadiness on walking and memory impairment and some definite mental retardation.

I have no hesitation in accepting the reports of both Dr. Karthirvel and Dato' Arumugasamy, they being admitted reports made by professional men whose only desire was to assist the Court in arriving at a correct assessment of the injuries and their effects sustained by the plaintiff in this tragic accident.

I shall take first the claim for general damages for pain and suffering and loss of amenities

The Award for Pain and Suffering and Loss of Amenities

Counsel for the plaintiff contended for an award of RM110, 000 in respect of the brain injury and the residual disabilities which flowed from it.

He cited, in support , the case of *Kuppusamy a/l Sundarajoo v. Nithannathan a/l Muniandy* [1990] 1 CLJ 1148 where I had awarded the sum of RM110,000 by way of general damages for pain and suffering and loss of amenities to a plaintiff who had sustained a diffuse irreversible brain injury which had left him with severe permanent disabilities; namely, deterioration in thought and memory, headache, giddiness and speech defect and secondarily, in feeling and conduct, so that he was incapacitated from performing his pre-accident job or pursue any worthwhile activities, though he was not in need of an attendant to help him with his toilet needs or his eating, bathing or dressing.

Another case which Counsel for the plaintiff cited was *Chong Ying Khoon v . Lee Joo Nam & Anor.* [1986] 2 MLJ cc1v where I had awarded RM80,000 by way of general damages for pain and suffering and loss of amenities to a plaintiff, a 48 year old Junior Technician with the Water Works Department, Penang, mainly for a brain injury he had suffered resulting in slurred speech, memory impairment and sleeping difficulties. He had also suffered from stiffness in the right arm and right leg.

Also cited by Counsel to the court, was *Ibrahim bin Mat Yatim & Anor. v. Gan Jiuk Tiau* [1985] 2 MLJ cx1viii where as a result of brain injury, a plaintiff had, suffered a severe and permanent personality change resulting in his becoming a completely detached person with his own deep thoughts as well as poor memory with lack of interest in his work, personal hygiene and his surroundings. Eusoff Chin J. (as he then was) awarded him $88,000 as general damages (RM18,000 for deafness as agreed and RM70,000 for head injuries).

On the other hand, Counsel for the defendants cited *Tominam bte. Tukimin v. Toh Kai Chup* [1985] 2 MLJ 345 where the plaintiff, a 25 year old factory operator, suffered a severe head injury resulting in epilepsy and though mentally normal she suffered impaired memory to a marked extent and could walk only with difficulty. She was awarded RM45,000 for pain and suffering and RM12,000 for epilepsy by Wee Chong Jin, CJ and also RM57,200 for loss of future earnings and RM15,366.55 for pretrial loss.

Counsel also cited *Tham Yew Heng v. Chong Toh Cheng* [1985] 1 MLJ 408 where the plaintiff, a 9 year old boy, had possibly suffered very severe post concussional damage to the brain resulting in deterioration in performance at school. Thean, J. awarded him RM35,000 as general damages for pain and suffering and loss of amenities and RM48,000 as loss of future earnings at RM200 per month for 20 years.

Other cases cited were *Kow Ah Dek & Anor. v. K. Ratnasingam* [1981] 2 MLJ 24 and *Teoh Suan Eng v. Lew Meng Shin & Anor.* [1982] 2 MLJ 291.

Counsel for the defendant, accordingly, contended that RM50,000 for general damages for pain and suffering and loss of amenities would be more than adequate.

Having given the fullest consideration to the evidence and the authorities cited and, doing the best I can, I would award the plaintiff:

(1) for the brain injury and the residual disabilities flowing from it, RM100,000 by way of general damages;
(2) for the general decrease in hearing intensity in all frequencies bilaterally in both ears, RM10,000 by way of general damages; and
(3) for the loss of her two incisors, having regard to *Goh Whatt Seng v. Chua Sek Kuon* BLJ June 1991, RM2,000 by way of general damages.

Nursing Care and Attention

It was said that the plaintiff is unable to look after herself or attend to her daily needs and so her sister (PW. 4) is doing so. In particular, her sister says that she bathes the plaintiff and cooks for her. The plaintiff's father says that he pays the sister RM3 per day to perform these duties.

Having regard to the injuries sustained by the plaintiff and the permanent residual disabilities the plaintiff suffers therefrom, I find nothing improbable in the claim for nursing care nor do I consider that the sum of $3 per day which the father says he pays to the sister for attending on the plaintiff, in any way excessive.

The plaintiff was 19 years of age at the time of the accident and it is not improbable that she would live until the age of 55 years. She was an inpatient at the General Hospital, Penang, from 3 October 1978 until 12 December 1978 - a period of about 2 1/3 months. This would amount to approximately RM38,700 (approximately RM90 x 430) which I would accordingly award to the plaintiff under this head.

Claim for Loss of Earnings

According to the testimony of the plaintiff's father and sister, at the time of the accident the plaintiff worked as a domestic servant and a baby sitter and was in receipt of a salary of RM150 per month, but neither had seen her working as such. Nor had her employer been called as a witness because it was said he was untraceable. Counsel for the defendant pointed out that in the report of the specialist, mention was made of the fact that the plaintiff "used to tap rubber before quite well".

In the circumstances, I do not consider the plaintiff - a married woman - has established on the balance of probabilities, any loss of earnings, and so I can make no award under this head whether for past or future earnings.

Similarly, I do not consider that the claim for transport expenses was proved sufficiently or at all.

To sum up, therefore, I enter judgment for the plaintiff against all three defendants as follows:

(1)	General damages for pain and suffering and loss of amenities:	RM100,000
(2)	General Damages for Nursing Care (past and future):	RM 38,700
(3)	General damages for loss of two incisors	RM 2,000
(4)	General damages for loss of hearing intensity in all frequencies in both ears	RM 10,000
(5)	Loss of Earnings	RM Nil
(6)	Special damages	RM Nil
		RM150,700

I would also award interest at the rate of 6% p.a. on general damages for pain and suffering and loss of amenities from date of service of writ. [See *Murtadza bin Mohamed Hassan v. Chong Swee Pian* [1980] 1 MLJ 216, 218 col. 2 para H. I need hardly say that the judgment debt will attract interest at the rate of 8% p.a. from the date of judgment until satisfaction under O. 42 r. 12 of the Rules of the High Court.

The defendants must also pay the plaintiff's costs of the action.